Supreme Court, U.S.
FILED
DEC 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1189

In The

Supreme Court of the United States

October Term, 1988

WALTER M. KETCHUM,

Petitioner,

vs.

ADMINISTRATOR, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTION PRESENTED

I. Are the due process or ex post facto principles as construed in *Bouie v. Columbia* violated where a State Supreme Court finds a disciplinary rule vague and amends it in a court decision and then retroactively applies the newly created rule to suspend an attorney's law license?

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PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

PRAYER

Petitioner Walter Ketchum respectfully prays that a writ of certiorari issue to review the judgment and order of the Illinois Supreme Court.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 124 Ill.2d 50, 528 N.E.2d 689 and is attached hereto in the Appendix.

JURISDICTION

On June 20, 1988, the Illinois Supreme Court entered an order suspending the petitioner from the practice of law for two years. Petitioner filed a timely petition for rehearing in the Illinois Supreme Court. On October 3, 1988, the Illinois Supreme Court denied the petition for rehearing. This petition is filed within ninety days of the order denying the petition for rehearing and is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The ex post facto clause of the United States Constitution provides, "No State shall . . . pass any . . . ex post facto law." U.S. CONST. Art. I, § 10.

The due process clause of the United States Constitution provides, "nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

Since the 1960's, Walter Ketchum ("Ketchum") and Richard LeFevour were good friends and neighbors. LeFevour and Ketchum were attorneys and also maintained a professional relationship in which they referred cases to each other. In addition, members of the LeFevour and Ketchum families were extremely friendly, grew up together and went to school together.

In 1968, LeFevour became a judge in the Circuit Court of Cook County, Illinois. Eventually, LeFevour was appointed the chief judge of Chicago's traffic court. In 1981, LeFevour was elevated to chief judge of the First Municipal District in Cook County. Ketchum's law firm had a substantial number of personal injury cases pending in the First Municipal District, although neither Ketchum, nor any members of his law firm, ever appeared before Judge LeFevour.

From time to time, Ketchum loaned money to LeFevour, both before and during LeFevour's tenure as a judge. The loans were informal in that no interest was charged, no notes were drawn and discussions regarding repayment did not occur. In short, the loans were motivated out of charity and friendship. Before LeFevour became a judge he repaid the loans. The complaint charged that Ketchum loaned LeFevour $8,300.00 over approximately four years, a period in which LeFevour was a judge. Although these loans were not repaid, Ketchum represented LeFevour's wife and three sons in a personal injury case which Ketchum believed would provide an ultimate source of repayment.[1]

In December of 1981, LeFevour contacted Ketchum and stated that he needed $10,000.00 so that he could pay the hospital bills of his sickly mother. LeFevour stressed that he needed the money so that his mother could be released to spend the Christmas holidays at home and be readmitted after the holiday season for additional hospitalization. Ketchum responded that he lacked the funds to make the entire loan, but volunteered to contact other attorneys to request that they assist in paying the hospital bill. Ketchum then contacted six attorneys; four of them agreed to make loans to Lefevour. Each drafted a $1,000.00 check payable to Richard LeFevour. Ketchum also loaned LeFevour $2,000.00 at that time.

In 1984, Judge LeFevour was indicted by a grand jury sitting in the Northern District of Illinois on mail fraud, tax fraud and racketeering charges. The charges were a part of the Operation Greylord investigation into corruption in the Circuit Court of Cook County. Dur-

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[1] The actual recovery in the personal injury case amounted to an initial judgment of $29,350.00 – more than enough funds to repay $8,300.00 in loans – and still remains intact today subject to Ketchum's lien in a trust account at $10,000.00. (Hearing Board Transcript, p. 172).

ing LeFevour's trial, evidence relative to attorney loans, including Ketchum's, was introduced in the form of a stipulation by the government.

Based on the evidence introduced at the LeFevour trial, the Administrator of the Attorney Registration and Discipline Commission filed a complaint against Ketchum. In the Illinois disciplinary system hearing panels, which comprise a Hearing Board, are empowered to "conduct hearings on complaints filed with the Board and on petitions referred to the Board. The panel shall make findings of fact and conclusions of fact and law, together with a recommendation for discipline, dismissal of the complaint or petition, or nondisciplinary suspension." 107 Ill.2d Rule 753(c)(3). A hearing panel concluded that Ketchum had violated Rule 7-110(a) of the Illinois Code of Professional Responsibility. This rule provided, in pertinent part, that an attorney "shall not give or lend anything of value to a judge." 107 Ill.2d Rule 7-110(a). The hearing panel ruled that Ketchum should be censured, finding that the loans were not made with the intent to influence LeFevour in his judicial capacity (nor did LeFevour yield any such influence), that the loans were motivated by friendship, and that no breach of judicial propriety occurred as a result of the loans. The matter was then referred to the Review Board, the next tier in the Illinois disciplinary system. The Review Board "may approve the findings of the Hearing Board, may reject or modify such findings as it determines are not established by clear and convincing evidence, may make such additional findings as are established by clear and convincing evidence, may approve, reject or modify the recommendations, may remand the proceeding for further action or may dismiss the proceeding." 107 Ill.2d Rule 753(e)(3). In considering the Hearing Board proceedings, the Review Board did not dispute the findings that the loans were motivated out of friendship and not made with the expectation of judicial favor, but nonetheless, concluded

that Ketchum should be suspended from the practice of law for one year. Both parties appealed to the Illinois Supreme Court.

In the mean time, the Administrator had instituted disciplinary charges against the four attorneys who loaned LeFevour money at Ketchum's request. In addition to these four attorneys, the Administrator also filed charges against two other attorneys who had loaned money to LeFevour. One of these attorneys loaned LeFevour $2,500.00 in 1981 and $2,000.00 in 1982. The other attorney, Patrick Tuite, loaned LeFevour $5,000.00 in 1982. Tuite's law firm, like Ketchum's, had numerous cases pending in the district over which LeFevour presided.

The disciplinary charges against the foregoing six attorneys ultimately reached the Illinois Supreme Court.[2] In a consolidated opinion, the Illinois Supreme Court noted that Rule 7-110(a) lacked clarity and required amendment. *In re Corboy*, 124 Ill.2d 29, 528 N.E.2d 694, 701 (1988). The court thus amended Rule 7-110(a) to be read in conjunction with Rule 65(C)(4) of the Illinois Code of Judicial Conduct.[3] The court found that the all six attor-

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[2] The six attorneys are prominent members of Illinois bar. The Illinois Supreme Court deemed them "outstanding attorneys." *Corboy*, 528 N.E.2d at 701.

[3] "Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

> (a) a judge may accept a gift incident to a public testimonial to him; book supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;
>
> (b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its

(Footnote continued on the following page)

neys committed violations under the amended rule prohibiting loans to a judge. The court, however, discharged the disciplinary charges against the six attorneys finding that they "were sailing in uncharted waters" and that "[i]t would be unfair to apply the limitation we have today for the first time defined to the respondents' conduct in 1981." *Corboy*, 528 N.E.2d at 701.

On the same day that it discharged the foregoing six attorneys, the Illinois Supreme Court suspended Ketchum's law license for two years. When read in juxtaposition, the two opinions issued on the same day read as if they were decided by two different courts in two different eras. Moreover, there is an invidious discrimination when Ketchum's law license is suspended for two years for loaning LeFevour $3,300.00 more than Patrick Tuite, while the complaint against Tuite, whose firm also had a substantial number of cases pending in LeFevour's district, was discharged. Although Ketchum, like the six attorneys in *Corboy*, had never appeared before LeFevour while LeFevour was a judge, the court based its decision on the *possibility* that Ketchum might curry judicial favor from LeFevour in the future. *In re Ketchum*, 124 Ill.2d 50, 528 N.E.2d 689, 693 (1988); App. 5. The court reached this factual conclusion although the administrative fact finding boards had not. Yet, while Ketchum was suspended

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3 *(continued)*

regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, including lawyers who practice or have practiced before the judge." 107 Ill.2d Rules 65(C)(4)(a), 65(C)(4)(b), 65(C)(4)(c).

for two years for loaning $8,300.00 to his long-time friend, before whom he never appeared, the Illinois Supreme Court subsequently discharged the complaint against an attorney who had loaned $15,000.00 to Judge Reginald Holzer, a judge before whom he never appeared but with whom he "enjoyed a casual, friendly relationship." *In re Mark E. Jones, Jr.*, ___ Ill.2d ___, ___ N.E.2d ___, (Ill. Sup. Ct. No. 66227, Slip Opinion, December 6, 1988, p. 2.) In *Jones*, the court found that because Jones had not appeared before the judge, "the Administrator asks us to infer that the respondent was willing to risk $15,000.00 in exchange for the chance that, *on some unspecified occasion in the future*, Holzer would be in a position to repay the favor." *Jones*, Slip Opinion, p. 7 (emphasis added).

Ketchum filed a Petition for Rehearing in the Illinois Supreme Court. The Court denied rehearing. Ketchum now petitions this Honorable Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW STANDS IN DIRECT CONFLICT WITH THIS COURT'S PRIOR HOLDING IN *BOUIE V. COLUMBIA*.

In *Bouie v. Columbia*, 376 U.S. 347 (1964), this Court found that the due process clause forbids "unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 351. *Bouie* also recognized that the due process clause prohibits retroactive judicial clarification and expansion of ambiguous and vague statutes. *Id. See also Marks v. United States*, 430 U.S. 188 (1977) (judicially created obscenity test announced in *Miller v. California*, 413 U.S. 15 (1973) could not be applied retroactively under the Fifth Amendment due process clause.); *Pierce v. United States*, 314 U.S. 306 (1941) ("judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes

must be defined with appropriate definitiveness.") In *Bouie* this Court also noted that objections to vague statutes "could not be cured retrospectively by a ruling either of the trial court or appellate court, though it might be cured for the future by authoritative judicial gloss." 378 U.S. at 353.

The pronouncements in *Bouie* were explicitly grounded in ex post facto concerns.[4] In *Bouie*, this Court found that the constitutional prohibitions against ex post facto laws fully apply where a court provides standards of conduct:

> If a State legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Id. at 353-54.

Here, the conclusion is inescapable that the decision of the Illinois Supreme Court stands in patent and inexcusable violation of this Court's unequivocal pronouncement in *Bouie*. The Illinois Supreme Court conceded that the

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[4] In *Calder v. Bull*, 3 Dall. 386 (1798), this Court provided a seminal statement on the intent and meaning of the ex post facto clause:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexted to the crime, when commited. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.

Id. at 390 (emphasis omitted). *See also Miller v. Florida*, 107 S. Ct. 2446 (1987); *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Dobbert v. Florida*, 432 U.S. 282, 292 (1977); *Cummings v. Missouri*, 4 Wall. 277, 325-26 (1867).

disciplinary rule alleged to be violated by Ketchum was ambiguous. In fact, the rule was so ambiguous that the court *sua sponte* amended the rule in the companion *Corboy* decision. *In re Corboy*, 124 Ill.2d 29, 538 N.E.2d 694, 701 (1988). Consistent with the uncertain terms of the former rule, the Illinois Supreme Court concluded that it would be unfair to punish the *Corboy* respondents for a violation of the amended rule forbidding loans to judges. *Id.* With respect to Ketchum, however, the Illinois Supreme Court *retroactively* applied the rule and deprived Ketchum of his law license for two years.[5] Such a course of action is plainly inconsistent with the principles announced in *Bouie*. Moreover, to the extent, if any, that Ketchum has been punished for a violation of the old version of Rule 7-110, the ruling below is nonetheless in violation of due process since the unamended version of Rule 7-110 was concededly void for vagueness.[6] (It is well-established that the due process clause forbids imposition of sanctions under void statutes. *United States v. Harriss*, 347 U.S. 612 (1954);

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[5] Petitioner undoubtedly was entitled to the protections and guarantees of the due process clause. A law license, of which the petitioner was deprived, is a property interest for purposes of the due process clause. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238 (1957); *In re Ming*, 469 F.2d 1352, 1355 (7th Cir. 1972); *Lasdon v. Hallihan*, 377 Ill. 187, 195, 36 N.E. 2d 227, 231 (1941).

[6] During the hearings below, Ketchum interpreted Rule 7-110 to forbid loans to judges where an attorney appeared before the judge. Although this construction was advanced in *Corboy*, the Illinois Supreme Court, in a case of first impression, rejected it. The court reasoned that although a judge may preside over a court in which an attorney does not practice, the judge, in the future, could be transferred to a tribunal in which an attorney practices. *Corboy*, 528 N.E.2d at 700. The Illinois Supreme Court, however, appears to have abandoned this one-time holding by its language in *In re Mark Jones, Jr.*: "the Administrator asks us to infer that the respondent was willing to risk $15,000.00 in exchange for the chance that, on some unspecified occasion in the future, Holzer would be in a position to repay the favor." *Jones*, Slip Opinion, p. 7.

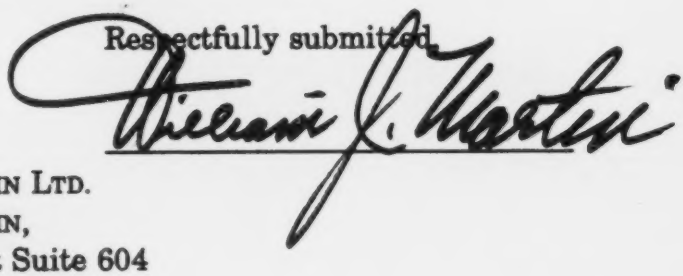
Lanzetta v. New York, 306 U.S. 451(1939). *See also Connally v. General Const. Co*, 269 U.S. 385, 391 (1926) (a statute is invalid under the due process clause where it is not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties").) Thus, the deprivation of Ketchum's law license under either the unamended or the amended version of Rule 7-110 is certainly violative of the due process clause. Moreover, the decision of the Illinois Supreme Court in this case clearly is inconsistent with a host of decisions which have remained faithful to *Bouie*. *See, e.g., Cole v. Young*, 817 F.2d 412, 418-419, (7th Cir. 1987); *Pringle v. Court of Common Pleas*, 788 F.2d 998, 1003, (3rd Cir. 1985); *Moore v. Wyrick*, 766 F.2d 1253, 1254-55, (8th Cir. 1985); *United States v. Godheim*, 651 F.2d 1294, 1297-1298, (9th Cir. 1981).

In sum, the decision of the court below is in direct conflict with a prior holding of this Court and is in conflict with decisions from courts across the nation. The deprivation of the petitioner's law license stands in violation of the due process and ex post facto clauses of the United States Constitution. This petition should thus be granted to rectify the injustice, correct the defiance of this Court's authority, alleviate the split between the holding in this case and others, cure the constitutional violations associated with the deprivation of Ketchum's law license and to clarify standards regarding retroactive application of judicial constructions.

CONCLUSION

Petitioner Walter Ketchum respectfully prays that a writ of certiorari issue to review the judgment and order of the Illinois Supreme Court.

Respectfully submitted,



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APPENDIX

IN RE KETCHUM

Cite as 124 Ill.Dec. 1, 528 N.E.2d 689 (Ill.1988)
528 N.E.2d 689
124 Ill.2d 50

In re Walter M. KETCHUM

Attorney, Respondent.
No. 65431.

Supreme Court of Illinois.

June 20, 1988.

Rehearing Denied Oct. 3, 1988.

On appeal from disciplinary proceeding, the Supreme Court held that making loans to and soliciting loans for circuit court judge or judge's mother violates disciplinary rule prohibiting lending anything of value to a judge and warrants two-year suspension.

Suspension ordered.

Attorney and Client

Making loans to and soliciting loans for circuit court judge or judge's mother violates disciplinary rule prohibiting lending anything of value to a judge and warrants two-year suspension. Code of Prof. Resp., DR 7-110(a), S.H.A. ch. 110A, foll. ¶774.

William J. Martin, Ltd., William J. Martin, Oak Park, for respondent.

Malcolm C. Rich, Executive Director, Chicago Council of Lawyers, Chicago, for Chicago Council of Lawyers, amicus curiae.

James J. Grogan, Atty. Registration and Disciplinary Com'n, Chicago, for Adm'r.

PER CURIAM:

Richard LeFevour, then presiding judge of the first municipal district of the circuit court of Cook County, was indicted in 1984 on charges of mail fraud, tax fraud, and racketeering. During the course of his trial, the government introduced evidence of certain financial transactions between LeFevour and Walter M. Ketchum, the respondent in this case. LeFevour was convicted in 1985 and sentenced to a term of imprisonment. In the wake of LeFevour's conviction, the Administrator of the Attorney Registration and Disciplinary Commission (ARDC) filed a two-count complaint charging the respondent with violations of Rules 1-102(a)(2), 1-102(a)(5), and 7-110(a) and Canon 9 of the Illinois Code of Professional Responsibility (107 Ill.2d Rules 1-102(a)(2), (a)(5), 7-110(a), 9-101 *et seq.*). After a hearing on the matter, in 1986 the hearing panel concluded that respondent had violated Rule 7-110(a) and recommended that respondent be censured. Both respondent and the Administrator appealed to the Review Board, and in 1987 the Review Board agreed with the hearing panel that respondent had violated Rule 7-110(a), but recommended a one-year suspension. On June 24, 1987, this court granted respondent leave to file briefs and present oral argument. The issue in this court is whether respondent's conduct in making loans to and soliciting loans for LeFevour or his mother violated Rule 7-110(a) and, if so, what sanctions are appropriate. Rule 7-110(a) provides in pertinent part that an attorney "shall not give or lend anything of value to a judge."

Respondent was a long-time friend and neighbor of LeFevour, whose residence was across the alley from respondent's. Their families were extremely friendly and their children grew up together, went to school together, and played together. Before LeFevour became a judge, he sometimes referred personal injury cases to respondent, and respondent sometimes referred criminal cases

to LeFevour while LeFevour was still in private practice. LeFevour continued to refer personal injury cases to respondent after LeFevour became a judge in the traffic court in 1968, but the Administrator did not charge wrongdoing on this account. In testimony before the hearing panel, respondent described LeFevour as a good source of business. LeFevour was named presiding judge of the first municipal district in 1981. During the period in question in this case, a large number of respondent's personal injury cases were pending in that district–at times as many as 50% of the cases he had on file.

Before LeFevour became a judge, respondent made loans to him from time to time. These loans were always repaid by LeFevour. After LeFevour became a judge, respondent continued to loan him money. These loans followed the same pattern: LeFevour would ask for a loan, whereupon respondent would write LeFevour a check from his business account. The loans were always interest-free, were never evidenced by a note, and times for repayment were never discussed. Respondent recalls neither the circumstances surrounding these loans nor the reasons LeFevour needed the loans. None of these loans, with the possible exception of the first one, were repaid by LeFevour.

The first loan, for either $1,000 or $2,000 (respondent cannot recall which), was made sometime after LeFevour became a judge but before February 1978. Although he cannot recall the circumstances, he claims that LeFevour repaid the loan. Between February 1978 and September 1982, respondent made five additional loans to LeFevour, totalling $5,300. Four of these loans, totalling $4,300, were made after LeFevour became the presiding judge of the first municipal district. None of these loans were repaid.

Respondent claims that four of the five loans made between 1978 and 1981 were advances on account of a tort action in which the respondent represented LeFevour's

wife, his two sons, and two other individuals not related to LeFevour. A review of the respondent's office records indicates that these payments to LeFevour, contrary to respondent's assertion, were not advances. Where monies were loaned by the respondent to his clients, the loans were recorded in cost ledger sheets kept by respondent's office in the regular course of business. We note, however, that the Administrator brought no charges against the respondent with respect to such loans. For the purpose of this proceeding, it is significant that there were no entries of any advances or loans on the cost ledger sheets which referred to LeFevour or the tort action that respondent was handling for the LeFevour family.

Respondent made two more loans to LeFevour in December 1981. On December 21, 1981, LeFevour called respondent and told him that his mother, Evelyn, with whom the respondent was acquainted, was hospitalized. Because of a dispute with his mother's insurance carrier, LeFevour needed to raise $10,000 to pay the hospital bill so that she could be released to spend the Christmas holiday at home and yet be readmitted to the hospital shortly thereafter if she required further hospitalization.

Although respondent had sufficient funds to loan LeFevour the amount requested, he responded to Lefevour that he was not able to make the loan. Instead he volunteered to contact other attorneys, using Judge LeFevour's name to request that they contribute to a fund to pay the hospital bill. LeFevour consented to the respondent's suggestion. Although the respondent did not tell LeFevour the names of specific individuals he would solicit, he told LeFevour he would call attorneys.

That same day the respondent spoke to six Chicago attorneys and asked each to contribute $1,000 to the hospital bill. One attorney refused outright, and later another attorney informed the respondent that he would not contribute because his wife objected. The other four attor-

neys each delivered checks to respondent in the amount of $1,000 payable to Richard LeFevour, the way in which the respondent told them he was making his own check payable. The respondent then wrote his own check to Richard LeFevour in the amount of $1,000 and delivered the five checks to LeFevour's bailiff. None of these loans were secured by notes, nor were provisions for repayment made.

LeFevour cashed respondent's $1,000 check. He deposited the other four checks in his personal checking account and within the next four weeks LeFevour expended these funds for a variety of purposes, but not for repayment of his mother's hospital bill.

On December 24, 1981, LeFevour requested $1,000 more from the respondent, which respondent loaned LeFevour interest-free and without a note by a check from his business account. Finally, respondent made a similar $1,000 loan to LeFevour in September of 1982. None of these loans were repaid.

In sum, in the time that LeFevour was a judge, respondent made LeFevour at least nine loans totalling at least $9,300. Only two loans, totalling either $2,000 or $3,000, were made in the 13 years LeFevour served as a judge in the traffic court. The loans increased in frequency after LeFevour became presiding judge of the first municipal district: seven loans, totalling $7,300, were made in the 20-month period after LeFevour became presiding judge.

The first count of the complaint filed by the Administrator against respondent relates to the loans made by respondent to LeFevour both before and after he became the presiding judge of the first municipal district. The second count relates to the respondent's solicitation of other attorneys to contribute funds for repayment of Evelyn LeFevour's hospital bill. As previously noted, only alleged violations of Rule 7-110(a) are before this court.

The hearing panel, in reviewing the respondent's conduct, found that although the evidence suported a conclusion that the respondent did not make loans to LeFevour with an intent to influence or obtain judicial favor, several factors necessitated sanctions against respondent. Among other things, the panel found that respondent was an experienced practitioner who admitted being aware of Rule 7-110(a) at the time the loans to LeFevour were made. The panel noted that respondent had more than a social relationship with LeFevour, because LeFevour referred business to him. Also, the panel found that respondent's contention that his payments to LeFevour represented advances toward recovery in a personal injury case rather than outright loans was not "candid and forthright," and that LeFevour never repaid nor did respondent make any effort to collect the loans. Therefore, the panel concluded that respondent had violated Rule 7-110(a) and recommended that the respondent be censured.

The Review Board agreed that the respondent had violated Rule 7-110(a). In arriving at its decison, the Review Board stressed the vital function of Rule 7-110 in our system of justice, noting that the rule is designed "to preserve and protect the integrity of our Judicial System and to preserve and maintain an independent and impartial Judiciary. The practice of attorneys making loans to sitting judges erodes and destroys the confidence of the public in the Bar, the Judiciary, the entire legal system."

The Board interpreted 7-110(a) as a *per se* rule–an absolute prohibition against lending or giving anything of value to a judge (except, of course, campaign contributions permitted by Rule 7-110(a)) regardless of the purpose of the gift or loan, or whether the attorney benefitted or anticipated gaining any benefit from his gift or loan. The Board acknowledged that LeFevour and the respondent were long-time friends, but concluded that "[w]hat may well have begun with innocuous loans between friends

struggling to begin practices developed into a festering sore whose infection spread and engulfed numerous other attorneys." Because respondent's action "was not one single isolated incident" but a "calculated, continuing wrong and a blot upon our profession and our system of Justice," the Review Board felt that censure was too light a sanction, and recommended a year-long suspension from the practice of law.

In this court, the Administrator argues that Rule 7-110(a) is a *per se* rule and therefore that each of the loans the respondent made to LeFevour, as well as the respondent's solicitation of loans from other attorneys on LeFevour's behalf to raise money to pay LeFevour's mother's hospital bill, constitutes a disciplinary violation without regard to whether the respondent received any benefit from his conduct. The Administrator asks that the respondent be suspended from the practice of law for a substantial period of time. Respondent argues that 7-110(a) is not a *per se* rule and that his actions were never motivated by a desire to influence the administration of justice or curry judicial favor, but solely by his friendship and desire to help the LeFevour family in their times of need.

Although the issue raised here by the parties is whether Rule 7-110(a) is a *per se* rule, our opinion in *In re Corboy* (1988) 124 Ill.2d 29, 124 Ill.Dec. 6, 528 N.E.2d 694, has already dealt with this question to the extent necessary to give adequate guidance to the bench and bar of this State. In that opinion, we held that evidence of dishonest intent and motive is not necessary to justify imposition of discipline. (*In re Corboy*, 124 Ill.2d at 39, 124 Ill.Dec. at 11, 528 N.E.2d at 699, citing *In re Clayter* (1980), 78 Ill.2d 276, 283, 35 Ill.Dec. 790, 399 N.E.2d 1318.) We further held that evidence showing a lack of dishonest intent is usually only appropriate to determine the nature and severity of the sanction imposed. (*In re Corboy*, 124 Ill.2d at 39, 124 Ill.Dec. at 11, 528 N.E.2d at 699, citing

In re Clayter (1980), 78 Ill.2d 276, 35 Ill.Dec. 790, 399 N.E.2d 1318.) It is unnecessary for us here to determine whether the *per se* construction urged by the Administrator is applicable. In *In re Corboy*, we declared that Rule 7-110(a) must be read in conjunction with the Code of Judicial Conduct, Rule 65(C)(4)(a) (107 Ill.2d R. 65(C)(4)(a)), and we directed an amendment to Rule 7-110(a) to that effect. By reading the amended rule as we have strictly construed it in *In re Corboy*, the limited extent to which an attorney may make a gift or loan to a judge will be apparent. However, under any analysis of Rule 7-110(a), respondent's loans were improper. The evidence supports the conclusion that respondent intended to and did in fact receive an actual benefit from the loans made to LeFevour. Therefore, we cannot accept respondent's contention that he had no intent to receive a benefit from his conduct. At all times relevant to his proceeding the respondent had a large volume of cases pending in the district over which LeFevour presided; the Review Board noted that at all times from 20% to 50% of the respondent's practice consisted of cases in that district. (*Cf. In re Corboy*, 124 Ill.2d at 48, 124 Ill.Dec. at 14, 528 N.E.2d at 702 (Board found attorney Tuite's firm had a number of cases in the first municipal division, but also found there was absolutely no evidence that attorney Tuite's loan was an attempt to gain favor in any way).) Although neither the respondent nor any of his associates in this case ever appeared before LeFevour, in view of the large volume of cases the respondent had in the first municipal district, as well as the fact that LeFevour was a good source of business for respondent, it was to respondent's advantage to maintain an amicable relationship with LeFevour, the administrative head of that branch, in the event it ever became necessary for him or his associates to appear before the presiding judge in a case or to make a request of the presiding judge, who in the exercise of his administrative responsibilities may have been of assistance to lawyers who had cases pending there.

It is obvious that the respondent's loans to LeFevour were a means of cementing and maintaing his relationship with his old friend, who had been elevated to the leadership of the district of the court in which he and lawyers in his office appeared frequently in a large number of cases. See *In re Schwarz* (1972), 51 Ill.2d 334, 282 N.E.2d 689 (motive and intent must ordinarily be inferered from conduct). Therefore, although it appears there had never been an occasion when LeFevour had actually favored him in the past, there was certainly the appearance of impropriety. Given this, and the fact that, at times, fully half of respondent's practice was in the division over which LeFevour presided, there was the real possibility that the respondent might be the beneficiary of LeFevour's favor in the future.

For that reason, we view the loans made to LeFevour and the solicitations the respondent made on behalf of LeFevour's mother as conferring a benefit on both LeFevour and the respondent. LeFevour benefitted through the receipt of the loans and respondent's services as solicitor of loans from other attorneys. Respondent intended to benefit and did benefit by the continuance and guarantee of a favorable relationship with the judge, which might prove to be valuable to respondent in the future.

That maintaining this benefit was the primary reason behind the loans is illustrated by the incident in which LeFevour asked the respondent for $10,000. Although the respondent had enough money to loan LeFevour the $10,000, and LeFevour was apparently in a situation where his family was in great need of the money to assure continued medical care for LeFevour's mother, respondent claimed not to have the money. This highlights that friendship and concern for LeFevour's family were not the underlying motives for the loans. This conclusion is supported by the fact that although respondent claims that all loans were made for purely friendly purposes, respondent has admitted that he actually could not remember the purpose

of any of the loans to LeFevour. Also, the marked increase in frequency of loans from respondent to LeFevour in the period after LeFevour became presiding judge suggests a purpose behind the loans other than friendship. Clearly, the respondent was not concerned about the financial need of LeFevour's family, but made the loans simply because he did not want to run the risk of incurring LeFevour's wrath and losing his favor by refusing to lend him money.

We conclude that under the circumstances of this case, it was a violation of Rule 7-110(a) for the respondent to make loans or give anything of value–in this case the respondent's services in soliciting other lawyers–to the presiding judge of a court or a division of a court in which the respondent had pending a substantial volume of the cases he was handling, even when the judge had never been personally involved in any of the cases.

This court has not had the occasion to decide the proper sanction for a violation of Rule 7-110(a). In determining the appropriate sanction for a disciplinary violation, each case must be decided on its own facts. (*In re Hall* (1983), 95 Ill.2d 371, 69 Ill.Dec. 370, 447 N.E.2d 805.) Respondent argues that the appropriate sanction, if any, is a private reprimand, based on several cases from other jurisdictions. These decisions are distinguishable because they involved isolated incidents of misconduct, not the kind of continuing pattern of misconduct at issue in the present case.

This case is far different from the cases consolidated in *In re Corboy*, where the attorneys' conduct constituted a violation of Rule 7-110(a) only because of the construction we placed on Rule 7-110(a) in that case. Here, respondent's conduct constituted a violation of that rule even without the strict construction we have placed on the rule in question.

Considering the seriousness of the disciplinary violations in this case, the repeated nature of the violations, and the fact that respondent is an experienced practioner who

knew of the prohibitions of Rule 7-110(a) at the time the loans were made, we feel respondent's conduct warrants a more severe sanction than censure. Accordingly, respondent is suspended from the practice of law for two years.

Respondent suspended.

Justice STAMOS took no part in the consideration or decision of this case.

Supreme Court, U.S.
FILED
JAN 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WALTER M. KETCHUM,

Petitioner,

vs.

ADMINISTRATOR, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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ADMINISTRATOR, ATTORNEY REGISTRATION
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS INVOLVED

The ex post facto clause of the United States Constitution provides, "No State shall . . . pass any . . . ex post facto law." U.S. CONST. Art. I, §10.

The due process clause of the United States Constitution provides, "nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV.

RULES OF THE SUPREME COURT OF ILLINOIS AND ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION INVOLVED

Supreme Court Rule 7-110. Relationship with Officials. (1980)

(a) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

Supreme Court Rule 7-110(a). Relationship (Amended 1988)

"(a) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal <u>except those gifts or loan which a judge or a member of his family may receive under Rule 65(c)(4) of the Code of Judicial Conduct</u>, except that a lawyer may make a contribution to the campaign fund of a candidate for such office."

Supreme Court Rule 65(c)(4). A Judge Should Regulate His Extrajudicial Activities To Minimize The Risk Of Conflict With His Judicial Duties.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related law, the legal system, or the administration of justice;

(b) a judge or member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift; loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, including lawyers who practice or have practiced before the judge.

Supreme Court Rule 771. Types Of Discipline

(a) disbarment;
(b) disbarment on consent;
(c) suspension for a specified

period and until further order of court;
(d) suspension for a specified period of time;
(e) suspension until further order of the court;
(f) suspension for a specified period of time or until further order of the court with probation; or
(g) censure.

INTRODUCTION

For the sake of brevity, Respondent will not provide sections in its brief for opinion below, jurisdiction, and statement of the case. Respondent will address in its argument those portions of those sections of Petitioner's brief which Respondent considers inaccurate or inadequate.

QUESTION PRESENTED

Whether the procedure employed by the Supreme Court of Illinois imposing discipline on Petitioner for his violation of long-established ethical principles violated the due process requirement or ex post facto clause of the United States Constitution.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, Petitioner was not denied due process of law during the course of the

disciplinary proceedings against him. Petitioner received notice of the charge and an opportunity to defend, in complete compliance with the due process requirements as mandated in In re Ruffalo, 390 U.S. 544 (1968).

Second, in disciplining Petitioner, the Supreme Court of Illinois did not retroactively apply a new standard to Petitioner's acts of misconduct in violation of the ex post facto clause. Petitioner's conduct was violative of the former construction of Rule 7-110(a) as well as the new construction.

Third, the amount of discipline imposed is within the discretion of the Supreme Court of Illinois. Such flexibility is crucial to achieve the ultimate goals of the disciplinary system. The only issue in fact raised by this petition is an issue of state law, which the Illinois Supreme Court has already decided.

ARGUMENT

Lawyer discipline is within the inherent authority of the state courts. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). Supervision of attorney conduct is one of the most crucial functions of the Supreme Court of

Illinois. See In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282, 1284 (1980).

Petitioner was suspended from the practice of law for two years by the Supreme Court of Illinois for making numerous and substantial interest free unsecured loans to the presiding judge of a division in which he regularly practiced. Further, Respondent was disciplined for soliciting loans from other lawyers to the judge despite knowing the judge's propensity for failing to pay obligations.

Respondent was suspended for violating Rule 7-110(a) of the Illinois Code of Professional Responsibility as amended in a companion attorney disciplinary case, In re Corboy, et al., 124 Ill.2d 29, 528 N.E.2d 694 (1988). Prior to the rule's amendment, Illinois strictly prohibited all loans or gifts from lawyers to judges except for

campaign contributions to designated judicial campaign committees. Id. at 699. In Corboy, Rule 7-110(a) was amended to permit lawyer gifts and loans to judges if judges could accept the items pursuant to state judicial ethics guidelines. Id. As a result of the amendment, lawyers are, among other things, explicitly permitted to make gifts and loans to judges if they constitute common social courtesies or if the gifts are between members of a family. Id. at 701.

In selecting the amount of attorney discipline to be imposed, the Illinois Supreme Court balances the need to be consistent with a consideration of the unique facts of the particular case. See In re Saladino, 71 Ill.2d 263, 375 N.E.2d 102 (1978). Based on the unique facts of this case, including the repeated nature of the disciplinary violations and

Respondent's contemporaneous knowledge that lawyers were forbidden by rule to make loans to judges, the Court suspended Petitioner. In re Ketchum, 124 Ill.2d 50, 528 N.E.2d 689 (1988).

Petitioner argues that he was denied due process when the Illinois Court sua sponte amended Rule 7-110(a) in the Corboy case. His argument is meritless. In In re Ruffalo, 390 U.S. 544 (1967), this Court stated that an attorney in a disciplinary proceeding is entitled to due process to the extent that he receives notice of the charge and an opportunity to be heard. Id. at 550. Both requirements have been met. Respondent had notice that he was charged with making and soliciting proscribed loans to a judge. He was afforded ample opportunity to defend the charges and he did so in a vigorous manner.

In support of his due process argument, Petitioner relies on this Court's holding in Bouie v. Columbia, 378 U.S. 347 (1964). Bouie, however, is easily distinguishable. In Bouie, it was found that due process was violated because a state's interpretation of a criminal statute punished conduct which was not criminal at the time the act was committed. Therefore, the defendants lacked fair warning that their conduct was prohibited. In this case, Respondent's actions were wrong under the prior disciplinary rule and wrong under the rule as amended. In that Respondent knew that loans to judges were prohibited, he had more than fair warning that he could not engage in such activity.

Petitioner cites several cases which stand for the proposition that the ex post facto clause prohibits application of a new law or standard to prior acts or conduct.[1]

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1. Bouie v. Columbia, 378 U.S. 347 (1964);
Marks v. United States, 430 U.S. 188 (1977);
Pierce v. United States, 314 U.S. 306 (1941);
Calder v. Bull, 3 Dall. 386 (1798);
Miller v. Florida, 107 S.Ct. 2446 (1987);
Weaver v. Graham, 450 U.S. 24 (1981);
Dobbert v. Florida, 432 U.S. 282 (1977);
Cummings v. Missouri, 4 Wall. 277 (1867).

Petitioner's ex post facto concerns are, however, misplaced based upon a review of the case law.[2]

Petitioner fails to understand that the Illinois Supreme Court did not retroativeley apply a new standard to his conduct. The Court held Petitioner's acts violated the former construction of Rule 7-110(a) as well as the new construction. 528 N.E.2d at 693. "It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law." Dobbert, supra, at 294.

2. In Bouie, Marks, Cummings, and Pierce, the manner in which the statute or law was applied transformed innocent conduct into criminal activity. In Miller, revised sentencing guidelines in effect at the time of sentencing were applied instead of the guidelines that were in effect when the defendant committed the crime. In Weaver, a new statute resulted in the reduction of a prisoner's credit time for good behavior that had been available under the repealed statute. In Calder, after plaintiff was awarded certain property, a subsequent law was passed which, in effect, divested the property. In Dobbert, a defendant's argument of ex post facto violation in regard to change in state death-sentencing procedure was rejected.

Petitioner fails to understand that the Illinois Supreme Court did not retroactively apply a new standard to his conduct. The Court held Petitioner's acts violated the former construction of Rule 7-110(a) as well as the new construction. 528 N.E.2d at 693. "It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law." Dobbert, supra, at 294.

Petitioner's basic underlying grievance is that he did not receive the same disciplinary sanction as certain attorneys in the Corboy case. In Corboy, six lawyers were found to have violated amended Rule 7-110(a). The Court declined, however, to impose sanctions upon them due to the unique facts surrounding their financial transactions.

The Court was not required to make Petitioner's sanction consistent with others who were found to violate the same

disciplinary rule. Final responsibility for determining discipline to be imposed on attorneys rests in the Supreme Court of Illinois. In determining the appropriate penalty, the Court may properly consider all facts and circumstances in aggravation and mitigation, including the attorney's actual conduct. See In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282 (1980). Furthermore, this Court has rejected the notion that there is a constitutional right of proportionality of sanctions, even in criminal proceedings. See e.g., Pulley v. Harris, 465 U.S. 37 (1984). Even if it could be argued that a criminal defendant were entitled to this type of proportionality, the concept should not apply to an attorney disciplinary proceeding. A disciplinary proceeding is simply not criminal in nature. In re Daley, 549 F.2d 469 (7th

Cir. 1977) cert. denied 434 U.S. 829 (1977). C.f., In re Ruffalo, 390 U.S. 544 (1968). (Disciplinary proceedings, although sui generis, described as quasi-criminal).

Flexibility in imposing sanctions is neither arbitrary nor unconstitutional, but necessary to achieve the goal of safeguarding the public, maintaining the integrity of the profession and protecting the administration of justice. See Middlesex County Ethics Committee, etc. v. Garden State Bar Association, et. al. 457 U.S. 423, 434-35 (1982). To achieve fair results, the disciplinary systems must be neither rigid nor mechanistic, but flexible enough to allow for the uniqueness of each case. See In re Leonard, 64 Ill.2d 398, 356 N.E.2d 62, 66 (1976). The Court must evaluate each situation independently because the circumstances

of each case vary substantially and sanctions which are appropriate in one situation may be inappropriate in another even though the underlying offense is similar or even the same. See In re O'Hallaren, 64 Ill.2d 426, 356 N.E.2d 520, 523 (1976). The Illinois Court correctly applied these principles in deciding the proper sanction for Petitioner.

In addition, Supreme Court Rule 771 provided Petitioner with sufficient notice that the state court had the authority to impose discipline ranging from censure to disbarment upon any finding of misconduct. 107 Ill.2d Rule 771. Thus the issue of appropriate sanction as raised by Petitioner is a matter of state law. No substantial federal questions exist.

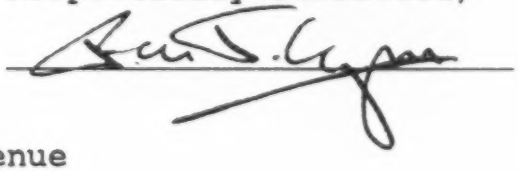
In summary, the due process provision of the United States

Constitution does not require a more exacting standard than that employed by the Supreme Court of Illinois. A clarification of a state ethics rule did not violate any ex post facto or due process principles. Further, disparate sentencing is not a proper basis for certiorari jurisdiction.

CONCLUSION

For the reasons set forth above, Respondents respectfully submit the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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